No. 48805-1-II

COURT OF APPEALS FOR THE STATE OF WASHINGTON
DIVISION II

CHRISTINE RICHARDSON,

Respondent,

v.

GOVERNMENT EMPLOYEES INSURANCE COMPANY,

Petitioner.

APPELLANT'S REPLY BRIEF

COLE | WATHEN | LEID | HALL, P.C.

Rory W. Leid III, WSBA #25075
A. Elyse O'Neill, WSBA #46563
Attorneys for Petitioner, GEICO
303 Battery Street
Seattle, WA 98121
Telephone: (206) 622-0494

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I. ARGUMENT AND AUTHORITY

A. The Trial Court has Disregarded Long Standing Washington Law

GEICO has requested this Court to reverse the erroneous February 25, 2016, ruling by the Trial Court, that removed its attorney client privilege, and work product doctrine protections, once litigation commenced.

By allowing the February 25, 2016, Order to stand, GEICO becomes subject to questions regarding trial strategy, litigation strategy and attorney/client communications. Moreover, Respondent would be entitled to question GEICO's representatives regarding counsel's thoughts and mental impressions after each witness took the stand, cross examination points and impeachment evidence it intended to use, and valuations of the case based on juror responses during the presentation of trial. In short, the Order has a chilling effect on GEICO's ability to defend itself in the instant matter.

On its face, the Trial Court's February 25, 2016, Order departs from over 100 + years of long standing Washington law and instead relies upon five out of state opinions that are in no way binding in Washington. There is no Washington authority to support the Trial Court's departure or Respondent's position regarding the materials sought. This ruling cannot stand and is an obvious and probable error, significantly harming GEICO in its ability to defend itself in this lawsuit. The ruling must be reversed.

1. Respondent is Seeking Trial Strategy and Attorney Client Privilege Communications during Litigation

Respondent is seeking discovery of litigation strategy and attorney-client opinions up to and even through trial. For example, every time GEICO were to receive new information from an expert, conduct a deposition, speak to its attorneys regarding developments in the case, or even after the first day of testimony at trial, Respondent would be allowed access to this information. The Order allows Respondent to make inquiry into how that new information impacted GEICO's litigation evaluation and impacted decisions made in reliance thereon. The order effectively removes GEICO's ability to advance its litigation strategy, implement proper litigation tactics, or develop a settlement strategy.

The Trial Court's order makes GEICO's current and future defense counsels possible necessary witnesses, because they participated in discovery, took and attended depositions, reviewed materials provided by Richardson in support of her claims, spoke with GEICO to discuss strategy, and made recommendations regarding the litigation. If allowed to stand, the Trial Court's Order, will allow Respondent to move to disqualify defense counsel, under RPC 3.7, in favor of conducting depositions of counsel, seeking to inquire into post-litigation issues like litigation strategy, litigation tactics, and settlement strategy. The impact from the Trial Court's Order must be remedied through reversal.

2. Washington Has Long Recognized the Attorney Client Privilege; since at least 1899

The underlying precedent that the Washington Supreme Court has long relied upon for the attorney client privilege, dates back to at least 1899

and the common law rule. *Pappas v. Holloway*, 114 Wn.2d 198, 202-03, 787 P.2d 30, 33-34 (1990) citing *State v. Emmanuel*, 42 Wn.2d 799, 259 P.2d 845 (1953) citing *Hartness v. Brown*, 21 Wash. 655, 59 P. 491, 1899 Wash. LEXIS 346 (Wash. 1899).

The attorney-client privilege exists to allow clients to communicate freely with their attorneys without fear of later discovery. *Soter v. Cowles Publ'g Co.*, 162 Wn.2d 716, 745, 174 P.3d 60, 76 (2007). The privilege encourages free and open communication by assuring that communications will not later be revealed directly or indirectly. *Id.* (internal citations omitted). "The attorney-client privilege applies to communications and advice between an attorney and client and extends to documents that contain a privileged communication." *Dietz v. John Doe*, 131 Wn.2d 835, 844, 935 P.2d 611 (1997). The Trial Court's order allows Richardson to invade the privilege through direct and indirect means, by deposing and discovering information specifically about GEICO's evaluation of post-litigation issues like litigation strategy, litigation tactics, and settlement strategy

The attorney-client privilege is a fundamental right, as affirmed by the US Supreme Court. Being the "oldest of the privileges for confidential communications known to the common law" the purpose is to encourage full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and administration of justice. *Upjohn Co. v. United States*, 449 U.S. 383, 389, 101 S. Ct. 677, 66 L. Ed. 2d 584 (1981). The privilege recognizes that sound

legal advice or advocacy serves public ends and that such advice or advocacy depends upon the lawyer's being fully informed by the client. *Id.* The Court went further and stated "the lawyer-client privilege rests on the need for the advocate and counselor to know all that relates to the client's reasons for seeking representation if the professional mission is to be carried out." *Id.* citing *Trammel v. United States*, 445 U.S. 40, 51 (1980).

The Washington Supreme Court, relying on *Upjohn* has interpreted CR 26(b)(4) to mean that notes or memoranda prepared by the attorney from oral communications should receive heightened protection. *Soter v. Cowles Publ'g Co.*, 162 Wn.2d 716, 740-41, 174 P.3d 60, 73 (2007). Only in rare circumstances, for example, when the attorney's mental impressions are directly at issue, can an attorney or legal team member's notes reflecting oral communications be revealed. *Id.* A rare circumstance would be a legal malpractice claim. For this reason, the *Pappas v. Holloway*, case does not support Respondent's position.

Respondent attempts to analogize a first party legal malpractice case to a bad faith case, such as the one at bar. This analogy fails. In *Pappas v. Holloway*, the mental impressions of the attorney, were directly at issue during the malpractice lawsuit (i.e., the conduct during representation is what lead to the legal malpractice suit). Therein, that case addressed some notable exceptions to the attorney-client privilege: one of particular importance was addressed when an attorney is sued for malpractice by a client. The Court noted it would be manifestly unjust to allow the client to

take advantage of the rule of privileges to the prejudice of the attorney, or when it would be carried to the extent of depriving the attorney of the means of obtaining or defending his own rights, and ruled the privilege is waived. *Pappas v. Holloway*, 114 Wn.2d 198, 204, 787 P.2d 30, 34 (1990) *citing Stern v. Daniel*, 47 Wash. 96, 98, 91 P. 552 (1907). GEICO relied upon *Pappas*, for the assertion that even after litigation has ceased, the attorney client privilege and work product doctrines do not cease to attach. *Pappas v. Holloway*, 114 Wn.2d 198, 209-10, 787 P.2d 30, 37 (1990).

In the instant matter, Respondent is already in possession of all the information regarding the actions GEICO took while adjusting the claims – the entirety of the claims files have been produced. There is no reason to allow Respondent to invade GEICO's attorney client privilege and work product, which attached following commencement of litigation.

The Trial Court's order effectively removes the fundamental right from GEICO, leaving it unable to defend itself in the instant litigation. The Order allows inquiry into post-litigation issues like litigation strategy, litigation tactics, and settlement strategy. Richardson would be entitled to inquire as to what GEICO representatives did upon receipt of legal counsel's opinions and what the representatives thought about those legal opinions. It would be manifestly unjust to allow Respondent to invade the privileges, and the Trial Court's order should be reversed as a result.

3. The Work Product Doctrine Allows Attorneys to Strategize Regarding a Case without Fear of their Strategy being Discovered

Under both the Federal and Washington rules, there is no distinction

between work product. *Heidebrink v. Moriwaki*, 104 Wn.2d 392, 396, 706 P.2d 212, 214-15 (1985). The test for determining whether such work product is discoverable is whether the documents were prepared in anticipation of litigation and, if so, whether the party seeking discovery can show substantial need. *Id.* This standard is not met if the discovering party merely wants to be sure nothing has been overlooked or hopes to unearth damaging admissions. *Id.* at 401. Respondent has provided no support to establish a substantial need. Rather, Respondent has speciously set forth unfounded and unsupported allegations of what she hopes the discovery will establish. However the fact remains that Respondent has yet to provide any shred of evidence to support even a prima facie case that her claims are meritorious, let alone evidence sufficient to invade post litigation privileges.

Here, following GEICO's full evaluation and determination that Ms. Richardson had been fully compensated with the $60,000 received (i.e., $25,000 from the underlying tortfeasor's policy limits & $35,000 from Ms. Richardson's PIP policy limits, including waiver of the PIP subrogation), Respondent filed suit. "Once the lawsuit was filed, this matter was under the aegis of and subject to the control of the courts." *Blake v. Fed. Way Cycle Ctr.*, 40 Wn. App. 302, 312, 698 P.2d 578, 584, *reconsideration denied, review denied*, 104 Wn.2d 1005 (1985). In order for a cause of action to be actionable, the act or practice must relate to out-of-court conduct. *Guijosa v. Wal-Mart Stores*, 144 Wn.2d 907, 921, 32 P.3d 250, 257 (2001). As a result of Respondent initiating a lawsuit on 8/19/13,

litigation commenced, and GEICO was no longer acting in its ordinary course of business, rather, GEICO was defending itself in a lawsuit.

B. The Appropriate Standard of Review is De Novo

The Trial Court resolved a question of law, thereby making a legal determination when it precluded GEICO from asserting its fundamental right to privilege and removed GEICO's ability to claim the work product doctrine, for materials generated after suit had commenced, and once those privileged attached. De novo review is proper where, the issues presented are questions of law. *Labriola v. Pollard Gp., Inc.*, 152 Wn.2d 828, 832, 100 P.3d 791 (2004). In the instant matter, the determination that GEICO is not entitled to its fundamental right to claiming the attorney client privilege or the work product doctrine must be reviewed de novo. *See Jane Doe v. Corp. of President of Church of Jesus Christ of Latter-Day Saints*, 122 Wn. App. 556, 563, 90 P.3d 1147 (2004) (citing *State v. Wood*, 45 Wn. App. 299, 311, 725 P.2d 435 (1986)), petition for review filed (Wash. Aug. 20, 2004) (No. 75870-1).

The Respondent does not refute any of the case law that GEICO has cited in support of de novo review. Rather, Respondent takes the position, merely because this is an order regarding discovery, that abuse of discretion is appropriate. Respondent's argument is based on a misunderstanding of the Court's order. The cases cited by Respondent do not deal with questions of law, rather they deal with factual findings that the trial court made:

- *State v. Mecca Twin Theater & Film Exchange, Inc.*, 82 Wn. 2d 87, 507

P.2d 1165 (1973)(wherein Mecca appealed the finding of contempt from an underlying show cause hearing for violating RCW 9.68.010(1), exhibiting an obscene motion picture. The Supreme Court stated findings of fact were made in support of the finding of contempt, and held the trial court had inherent power to issue a show cause order, due to its broad powers to permit discovery);

- *State v. Masaros*, 62 Wn. 2d 579, 384 P.2d 372 (1963)(wherein Masaros appealed a judgment and sentence of murder in the first degree. The trial Court addressed Masaros's discovery motion to inspect, which it granted in part; Masaros never followed up thereafter. The Supreme Court found that due to Masaro's failure to file his additional discovery motion, the Court was never given the opportunity to exercise its discretion to grant further discovery);
- *State v. Boehme*, 71 Wn.2d 621, 430 P.2d 527 (1967)(wherein Boehme failed to take the Court up on its inherent invitation for defendant to renew his motion and present a more adequate showing of necessity, finding the case fit squarely within the *Masaro* decision)
- *Penberthy Electromelt Intern. Inc. v. U.S. Gypsum Co.,* 38 Wn. App. 514, 686 P.2d 1138 (1984)(wherein the trial Court made a factual finding regarding a trade secret being subject to a protective order. The Court discussed the steps PEI took to safeguard design and construction of their forehearth, which included a confidentiality clause in a contract for sale of the same to another vendee. The Court of Appeals

determined the trial Court did not abuse its discretion in making this factual finding and precluding discovery of the same).

- *Rhinehart v. Seattle Times Co.,* 98 Wn.2d 226, 354 P.2d 673 (1982)(wherein the Washington Supreme Court addressed the constitutionality of CR 26(c). It further addressed whether a trial court properly compelled the Plaintiffs in a libel action to disclose certain personal information during discovery, though it prohibited the Defendant newspapers from publishing the material. The trial court determined to the extent the materials provided in discovery were not made part of the public record, they were subject to protection).

In the instant matter, the Trial Court made a legal determination regarding GEICO's privileges. The cases cited by Respondent do not address questions of law; as such, they are inapplicable to the case at bar. Whether GEICO's privileges of work product and attorney client apply is a question of law and is properly reviewed de novo on appeal.

C. GEICO Relies Upon Binding Washington Authority

GEICO has cited to binding Washington Authority, directly on point in the instant appeal. GEICO has also included citation to some Washington District Court and other Federal District Court opinions, not asserting that they are binding, but rather to demonstrate how the Federal Courts are treating the same or similar issues.[1]

D. Respondent has not Refuted the Characterization of the Materials She Seeks through Discovery

1 Of note, the Trial Court relied upon a Washington District Court opinion – despite other District Court cases to the contrary. As such, GEICO has submitted and argued those cases to further establish the Trial Court's Order is wrong.

The Trial Court's carve out regarding discovery does not protect GEICO and leaves it unable to defend itself moving forward towards trial. GEICO set forth different types of materials that Respondent could seek, as a result of the incorrect February 25, 2016 Order. Respondent does not refute the materials being sought; rather, Respondent affirms she does intend to request information regarding trial strategy, litigation tactics, and settlement strategy. *Resp. Opening Brief* at 14. Respondent relies upon a fundamental misunderstanding and misreading of two unpublished federal court opinions, *Langley v. GEICO* and *Batchelor v. GEICO*; two cases which are entirely distinguishable from the case at bar.

1. Langley v. GEICO is in no way Similar to the Case at Bar

Respondent has misinterpreted the District Court's finding in *Langley*. Judge Mendoza, in *Langley*, found counsel to be a **fact** witness with discoverable information regarding GEICO's **investigation** of Mr. Langley's fire loss property damage claim of an RV motorhome, **prior** to the commencement of litigation. Specifically, counsel was retained during the investigation phase, and was asked to conduct an examination under oath on behalf of GEICO, while GEICO continued to investigate the loss. GEICO afforded coverage to Mr. Langley under the policy. Plaintiff argued GEICO's counsel should be disqualified from continuing to represent GEICO at trial because Plaintiff intended to call GEICO's counsel as a fact

witness during trial. Judge Mendoza, made a finding that counsel was a fact witness to the underlying investigation, and under RPC 3.7 disqualified.[2] 3

The instant matter involving Respondent is a UIM case, dealing with personal injuries, not property damage. Moreover, in the instant matter, GEICO investigated and adjusted the PIP and UIM claims in their entirety without the assistance of retained counsel. GEICO did not retain an attorney to represent it until 1) Respondent demanded PIP arbitration, which is akin to litigation, and staff counsel for GEICO defended the arbitration hearing, and 2) after Respondent had filed suit in Kitsap County, Defense Counsel was retained. No examination under oath was conducted of the Respondent – GEICO immediately afforded coverage under both the PIP and UIM claims, and timely investigated the claims. CP 392-537. The Trail Court found GEICO did not deny coverage. CP 965-967.

During the course of discovery, the parties disagreed on the materials that needed to be produced. As such, the parties submitted briefing to the Court, and the documents for *in camera* review. The Trial Court issued the following Orders:

- The July 16, 2014 order, set forth "the Court has determined that all

2 GEICO timely moved for reconsideration on this determination, which the Court denied. By asserting the facts of the *Langley* matter in the instant briefing, GEICO in no way waives, and hereby expressly reserves any and all rights regarding appeal of that case.

3 Of note, the Washington Supreme Court recently decided the case, *Perez-Crisantos v. State Farm*, which overruled *Langley*, and disagreed with the reasoning of that Court. The Supreme Court held IFCA does not create a cause of action for regulatory violations. No. 92267-5, 2017 Wash. LEXIS 92, at *14 (Feb. 2, 2017). The *Perez* Court accepted the analysis in *Ainsworth v. Progressive*, and found "[t]he insured must show that the insurer unreasonably denied a claim for coverage or that the insurer unreasonably denied payment of benefits. If either or both acts are established, a claim exists under IFCA." *Perez-Crisantos v. State Farm Fire & Cas. Co.*, No. 92267-5, 2017 Wash. LEXIS 92, at *16-17 (Feb. 2, 2017)

documents are to be disclosed, subject to protective order, with the exception of a redaction of lines 5-7 and line 9 in Bates number 763." CP 86-88.

- The August 5, 2014 order found "the attorney was not engaged in claims adjustment work." CP 106-109.
- The September 12, 2014 order found that the waived attorney-client privilege is limited to the documents submitted for *in camera* review, including those generated after August 19, 2013. However, the privilege is not waived as to documents generated after August 19, 2013 but not submitted for *in camera* review. CP 127-129.

Following the Court's orders, GEICO complied and produced the claims files for PIP and UIM in their entirety. Respondent merely attempts to use the *Langley* matter for an improper purpose; the case is in no way analogous to the instant matter and has no bearing on the issues here.

2. Batchelor v. GEICO is in no way Similar to this Case.

Respondent has taken the 2016 *Batchelor* order entirely out of context. The *Batchelor* case involved a UM action, wherein the jury returned a verdict in excess of Ms. Bachelor's UM policy limits. *Batchelor v. Geico Cas. Co.*, 142 F. Supp. 3d 1220 (M.D. Fla. 2015). Thereafter, Ms. Batchelor amended her complaint alleging claims of bad faith, using the excess verdict as evidence thereof. *Id.*

During the bad faith litigation trial, the UM adjuster was unable to recall any specifics regarding the adjustment of the claim. *Id.* at 1231. GEICO elected to call its attorney defending the underlying UM coverage

action testify regarding the claims investigation and claims adjustment – the court found that this resulted in a waiver of the attorney client privilege for the underlying action. *Id.* Based on testimony of the attorney defending the UM coverage action, the Court conducted an *in camera* review and determined GEICO had improperly withheld materials. *Id.* at 1243. Thereafter, it ordered a new trial based on the documents reviewed. *Id.* 1244

The instant matter is in no way similar to the *Batchelor* case. The instant matter has not yet gone to trial; there has been no adjudication on the Respondent's UIM claim. Moreover, there has been no attorney involvement for the adjustment of either PIP or UIM claims. The trial Court ruled there has been no denial of coverage. CP 965-967. This matter is before this Court because the February 25, 2016, order removes GEICO's privileges and ability to defend the instant matter.

3. The Carve Out in the February 25, 2016 Order Does Not Limit the Scope

The Trial Court Order does nothing to limit the scope of the discovery sought. RPC 1.2 specifically provides in relevant part:

> SCOPE OF REPRESENTATION AND ALLOCATION OF AUTHORITY BETWEEN CLIENT AND LAWYER
> (a) Subject to paragraphs (c) and (d), a lawyer shall abide by a client's decisions concerning the objectives of representation and, as required by RPC 1.4, shall consult with the client as to the means by which they are to be pursued. A lawyer may take such action on behalf of the client as is impliedly authorized to carry out the representation. A lawyer shall abide by a client's decision whether to settle a matter…

Any action taken by Defense Counsel necessarily requires the consent of at least one or more of GEICO's employees because GEICO is the client. As such, the "limitation" set forth by the Trial Court is illusory.

E. GEICO Timely Moved for Clarification and Reconsideration; Arguments Regarding the Inapplicability of *Cedell* have been Properly Preserved

Respondent's argument regarding the prior Trial Court's Order re *Cedell* is misplaced. The Trial Court issued an order on July 16, 2014, which set forth "the Court has determined that all documents are to be disclosed, subject to protective order, with the exception of a redaction of lines 5-7 and line 9 in Bates number 763." CP 86-88. GEICO timely moved for clarification and reconsideration. CP 89-105. Thereafter on August 5, 2014, the Court issued an order and found "the attorney was not engaged in claims adjustment work." CP 106-109. Based on that finding and clarification, GEICO timely moved for clarification and reconsideration. CP 110-123.

Thereafter, on September 12, 2014, the Court issued an order and found that the waived attorney-client privilege is limited to the documents submitted for *in camera* review, including those generated after August 19, 2013. However, the privilege is not waived as to documents generated after August 19, 2013, but not submitted for *in camera* review. CP 127-129.

Following the Court's order of September 12, 2014, which clarified the finding that any waiver was limited to the materials produced for *in camera* review, GEICO made an economic decision not to appeal. The Court had advised GEICO was not under a continuing obligation to supplement the defense counsel file. CP 127-129.

Respondent has attempted to assert the Trial Court has repeatedly rejected GEICO's argument that documents subsequent to the start of litigation are absolutely privileged. *Resp. Opening Brief at 5*. This assertion is factually untrue. GEICO took the position that once suit commenced (i.e., August 19, 2013), everything created thereafter is deemed privileged and protected from disclosure. The Court agreed and issued an Order of 9/12/14:

> The Court now clarifies and finds that the waived attorney-client privilege is limited to the documents submitted for *in camera* review, including those generated after August 19, 2013. ***However, the privilege is not waived as to documents generated after August 19, 2013 but not submitted for in camera review.***
>
> . . .
>
> **ORDERED** that the documents generated after August 19, 2013 and submitted for *in camera* review shall be provided with a protective order no later than 30 days from receipt of this order on reconsideration. ***Documents generated after August 19, 2013 but not submitted for in camera review do not need to be disclosed.***
>
> CP 127-129

GEICO brought the motion for reconsideration and clarification, to avoid this specific issue which Respondent has attempted to relitigate before the Court; to have the Court rule whether GEICO had a continuing obligation to continue producing materials created after the August 19, 2013 date. The court ruled it did not. CP 127-129.

Nearly a year and a half later, following supplementation by GEICO, and GEICO's second motion for protective order and Respondent's Motion to Compel, the Trial Court issued an order on February 25, 2016, directly contradicting its prior September 12, 2014 Order - thereby precluding GEICO's ability to assert the attorney client privilege and

removing the work product doctrine. This Order was issued, despite the Trial Court previously finding the privileges were **not** waived for any materials not submitted for *in camera* review. GEICO's position regarding the issue was clear. GEICO made an economic decision not to appeal the original September 12, 2014 order, because it had been assured by the Trial Court that it was under no obligation to continue to disclose materials.

F. GEICO Has Previously Distinguished the Out of Jurisdiction Cases the Trial Court Relied Upon in Making its Decision

GEICO has gone through, in detail, in its opening brief why the out of jurisdiction cases cited by the Trial Court are in no way applicable to the instant matter, and are not binding in Washington. *Opening Brief* at 24-29. Respondent fails to establish how the cases are in any way applicable. Rather, she appears to merely quote the language from the out of jurisdiction cases, without refuting GEICO's distinctions.

Washington authority is contrary to the cases cited. Specifically the Washington Court of Appeals has found:

> We have good reason to treat first- party bad faith claims involving the processing of UIM claims differently, however. UIM carriers stand in the shoes of the underinsured motorist/tortfeasor to the extent of the carrier' s policy limits. *Dayton v. Farmers Ins. Group*, 124 Wn.2d 277, 281, 876 P. 2d 896 (1994). Consequently, the UIM carrier is entitled to pursue all the defenses against the UIM claimant that could have been asserted by the tortfeasor. See id. (the UIM carrier is not compelled to pay if the same recovery could not be obtained from the tortfeasor). Because the provision of UIM coverage is by nature adversarial, an inevitable conflict exists between the UIM carrier and the UIM insured. *Fisher v. Allstate Ins. Co.*, 136 Wn.2d 240, 249, 961 P. 2d 350 (1998). The friction between this adversarial relationship

> and the traditional fiduciary relationship of an insured and an insurer is difficult to resolve.

Barry v. USAA, 98 Wash. App. 199, 204-05, 989 P. 2d 1172 (1999) (*cited* in *Cedell*, 176 Wn.2d at 693). In Washington, the adversarial nature of insurers and insureds involved in UIM suits, is treated differently.

Five of the six cases cited by the Trial Court, *T.D. S.*, 760 F. 2d at 1527; *Babai*, 2015 WL 1880441, at *4- 57; *White*, 710 P. 2d at 317; *Gregory*, 575 So. 2d at 534- 35; and, *O' Donnell*, 734 A.2d at 904, did not involve UIM claims, which, as previously set forth in *Barry*, are treated differently due to the adversarial nature of the claim.

Additionally, in *Gregory*, the post-litigation conduct at issue involved the insurer's failure, after the suit was initiated, to provide the insured with a letter explaining what she needed to do in order to comply with her policy and receive payment for her claim. *Gregory*, 575 So. 2d at 541- 42. The instant matter does not involve a failure to cooperate; rather it is a value dispute regarding Respondent's UIM claim.

In *O'Donnell*, the court found that post-litigation conduct of an insurer was discoverable because the plain language of the applicable statute did not limit a bad faith claim to only pre- litigation conduct. *O'Donnell*, 734 A.2d at 906. The applicable Washington statutes cannot be read to be as broad as Pennsylvania's in the *O'Donnell* case.[4]

4 Compare 42 Pa. Cons. Stat. Ann. § 8371, as quoted in *O'Donnell*, 734 A.2d at 905 ("[i]n an action arising under an insurance policy, if the court finds that the insurer has acted in bad faith toward the insured, the court may take all of the following actions . . .") with RCW 48.01.030 ("The business of insurance is one affected by the public interest, requiring that all persons be actuated by good faith, abstain from deception, and practice honesty and equity in all insurance matters.") and RCW 48.30.010(7) ("An insurer engaged in the business of insurance may not unreasonably deny a claim for coverage or payment of benefits to any first party claimant.").

The sixth case relied upon by the Trial Court, supports GEICO's position. The *Palmer* case did involve a UIM claim. However, the court found that evidence of the insurer's litigation tactics and strategy was prejudicial to the insurer because it allowed the insured to focus its case on the trial preparation strategy and litigation tactics of the insurer's attorneys, rather than on whether the insurer had a reasonable basis for denying liability. *Palmer*, 861 P. 2d at 909. The court added that courts should rarely allow such evidence and that public policy favors the exclusion of such evidence in two respects: "First, permitting such evidence is unnecessary because during the initial action, trial courts can assure that defendants do not act improperly. Next, and more importantly, the introduction of such evidence hinders the right to defend and impairs access to the courts." *Palmer*, 861 P. 2d at 913- 14. The court also noted that generally, an insurer's litigation tactics and strategy in defending a claim are not relevant to the insurer's decision on coverage, and stated "[i]ndeed, if the insured must rely on evidence of the insurer's post-filing conduct to prove bad faith in denial of coverage, questions arise as to the validity of the insured's initial claim of bad faith." *Palmer*, 861 P.2d at 915.

1. Respondents' Newly Cited Out of Jurisdiction Cases Do Not Support Her Position

Respondent goes on to cite additional out of jurisdiction cases, again failing to address any of the applicable Washington cases on point. Moreover, the cases do not support her position; rather support GEICO's.

- *Parsons ex rel. Parsons v. Allstate*, 165 P.3d 809, 819 (Colo. App. 2006), which set forth an attorney's actions designed to defend an insurer in a UIM case, would not be evidence of bad faith because an insurer is entitled to protect its interests in circumstances like those arising in this case. The Court held the attorney's conduct in this case did not amount to the "extraordinary facts," found only in "rare instances," that would justify allowing a jury to consider an attorney's litigation conduct as part of a bad faith claim. *Id.*
- *Knotts v. Zurich*, 197 S.W.3d 512, 522 (Ky. 2006), directly contradicts the Respondent's position, by specifically holding:

> However, given the chilling effect that allowing introduction of evidence of litigation conduct would have on the exercise of an insurance company's legitimate litigation rights, any exception threatens to turn our adversarial system on its head. We are confident that the remedies provided by the Rules of Civil Procedure for any wrongdoing that may occur within the context of the litigation itself render unnecessary the introduction of evidence of litigation conduct. This is particularly true given that the attorneys, who in fact control and perpetuate the litigation conduct on behalf of an insurance company, are subject to direct sanction under the Civil Rules for any improper conduct. Though it goes without saying, we also note that those attorneys have significant duties under the Rules of Professional Responsibility, which allow for further sanctions for unethical behavior. Thus, we think the better approach is an absolute prohibition on the introduction of such evidence in actions brought under KRS 304.12-230.

- *Federated Mut. Ins. Co. v. Anderson*, 1999 MT 288, ¶ 25, 297 Mont. 33, 42, 991 P.2d 915 (Mont. 1999) (which dealt with the issue of post-judgment conduct and whether that could constitute malice in a bad faith claim. Federated relied heavily on *Palmer*. The Court found:

> Generally, an insurer's litigation tactics and strategy for defending a claim are not relevant to the decision to deny coverage. The trial court should weigh the probative value of the evidence against the inherently high prejudicial effect of such evidence, keeping in mind the insurer's fundamental right to defend itself. *See Palmer*, 261 Mont. at 123, 861 P.2d at 915.

- *Gooch v. State Farm Mut. Auto. Ins. Co.*, 712 N.E.2d 38, 42 (Ind. Appl. 1999) does not support Respondent's position. The *Gooch* Court states:

> When evaluated through the prism of the substantive law, an insurance company's postfiling conduct, particularly its litigation conduct, has little relevance to proving that the insurer's prefiling actions resulted in the wrongful denial of policy benefits. Litigation, in almost all cases, does not commence until after the policyholder's claim has been denied or the insurer has failed to respond to a policyholder's claim within a sufficient amount of time. In contrast, the wrongful tort occurs, or does not occur contemporaneously with the "wrongful denial of coverage" -- an act that occurs well before any improper litigation conduct takes place . . . . The tort itself occurs when the contract is breached unreasonably.
> *Id.* In the case at bar, the conduct in question occurred after she filed her lawsuit based on the uninsured motorist claim but before she filed the bad-faith claim. Moreover, the conduct is relevant to whether State Farm failed to take certain actions in order that they could maintain a legal position that would involve substantial cost and delay.

- *Tucson Airport Authority v. Certain Underwriters at Lloyd's, London*, 186 Ariz. 45, 918 P.2d 1063 (Ariz. App. 1996) (which dealt with a motion to dismiss a third party bad faith claim for failing to settle a claim within limits, not a UIM/UM claim, as in the instant matter. Moreover, the Tucson Court relied heavily on the *White v. Western Title Ins.* case from California, which also does not deal with a UIM/UM matter).

None of the newly cited cases support Respondent's position that Washington would allow her to invade GEICO's attorney client privilege

and word product doctrine. In fact, some (i.e., *Parsons*; *Knotts*; *Federated;* and *Gooch*) tend to support GEICO's position. This Court should disregard the Respondent's arguments, and reverse the Trial Court's order.

G. While not Entirely Material to the Issues on Appeal, Respondent's Facts are Inaccurate

As demonstrated by the record, Respondent has inaccurately depicted the facts here. GEICO sets forth the following to correct the record.

1. GEICO Found Ms. Richardson to Have Been Fully Compensated

This matter involved a value dispute, rather than a denial of coverage. The record establishes GEICO reasonably evaluated Ms. Richardson's claims, and determined Ms. Richardson had been fully compensated with the underlying settlement totaling $60,000 (i.e., $25,000 from the underlying tortfeasor's policy limits & $35,000 from Ms. Richardson's PIP policy limits, including waiver of the PIP subrogation). CP 504. The record further establishes that the Trial court agreed, and determined no denial of coverage had occurred, and dismissed Respondent's claims for *Olympic Steamship fees*. CP 965-967. Moreover, based on the Court's finding that no denial of coverage occurred, GEICO once this appeal has been resolved, the Trial Court can find as a matter of law that because no denial of coverage occurred, Respondent's IFCA claims must also be dismissed. *Perez-Crisantos v. State Farm Fire & Cas. Co.*, No. 92267-5, 2017 Wash. LEXIS 92, at *16-17 (Feb. 2, 2017). As such, Respondent will be left with allegations of bad faith and CPA, further necessitating the need for reversal of the Court's February 25, 2016 Order.

With no viable IFCA cause of action, Richardson's claims are significantly reduced, establishing there is no substantial need to pierce GEICO's attorney client privilege or work product doctrine. Respondent's arguments are without merit, and are inapplicable to the instant issue on appeal.

2. GEICO Timely Moved for Reconsideration and Clarification In Order to Avoid the Instant Issue Before the Court

As set forth at §E *supra*, the motions for reconsideration and clarification, filed by GEICO, properly preserved any arguments relating to *Cedell*. Respondent has attempted to assert the Trial Court has repeatedly rejected GEICO's argument that documents subsequent to the start of litigation are absolutely privileged. *Resp. Opening Brief at 5*. This assertion is factually untrue. GEICO took the position that once suit commenced (i.e., August 19, 2013), everything created thereafter is deemed privileged and protected from disclosure. The Court agreed and issued an Order of September 12, 2014, which states in relevant part:

> The Court now clarifies and finds that the waived attorney-client privilege is limited to the documents submitted for *in camera* review, including those generated after August 19, 2013. ***However, the privilege is not waived as to documents generated after August 19, 2013 but not submitted for in camera review.***
>
> . . .
>
> **ORDERED** that the documents generated after August 19, 2013 and submitted for *in camera* review shall be provided with a protective order no later than 30 days from receipt of this order on reconsideration. ***Documents generated after August 19, 2013 but not submitted for in camera review do not need to be disclosed.***
>
> CP 127-129

GEICO brought the motion for reconsideration and clarification, to

avoid this specific issue which Respondent has attempted to relitigate before the Court; to have the Court rule whether GEICO had a continuing obligation to continue producing materials created after the August 19, 2013 date. The court ruled it did not. CP 127-129.

3. The Testimony of GEICO's CR30(b)(6) Designee Was Proper

Respondent's counsel attempted to inquire into topics beyond the scope of the 30(b)(6). GEICO's counsel objected, but the witness testified to the extent he could. By way of example, during the 30(b)(6) deposition, Ms. Richardson's counsel asked and GEICO's counsel objected:

> Q. The next affirmative defense states that: Plaintiff's recovery, if any, is limited to the terms of the insurance contract. Is GEICO aware of the concept of extra-contractual damages?
> A. Extra-contractual in regards to the underinsured motorist?
> MR. LEID: I'm going to object. It's beyond the scope. I'll let you go ahead and answer.
> A. Can you please expand on extra-contractual?
> Q. Well, that's what I'm trying to get to, so it's Catch 22, I guess. Do you understand what extra-contractual damages are?
> A. I certainly do.

CP 310-314 (**Ex. 1** at 31:24-32:12)

> Q. The next affirmative defense has to do with duties that were owed to the plaintiff, Ms. Richardson. What duties does GEICO have with respect to Ms. Richardson?
> MR. LEID: Objection. It's beyond the scope. I'll let you go ahead.
> A. To handle all claims fairly and promptly and to conduct an investigation regarding the actual allegations and the specials submitted and evaluations.
> Q. And when do those duties actually commence?
> MR. LEID: The same objection. Go ahead.
> A. From the beginning of the claim when the claim is filed.
> Q. When do those duties end?
> MR. LEID: The same objection. Go ahead.

A. When the claim is resolved.

CP 310-314 (**Ex. 1** at 33:5-33:19)

> Q. Can you tell by looking at the claims file whether there was an IFCA notice sent on November 4th, 2011?
> MR. LEID: Objection, beyond the scope. Go ahead.
> A. In looking at the claim file that is just strictly for the underinsured motorist, I don't see any notation of that. It's not to say it may not have occurred on the cross file or the companion file with the no-fault coverage.

CP 310-314 (**Ex. 1** at 51:22-52:7.)

GEICO's designee was permitted to respond to the extent that he knew on nearly every occasion. By way of further example:

> Q. That's okay. I understand. Referring to Interrogatory No. 83, which is basically investigation of the insured, other than the IME, has GEICO investigated Mrs. Richardson at all between February 2010 when the loss occurred and the present date?
> MR. LEID: I'm going to instruct you not to answer anything post litigation. But before, you can answer.
> A. Now, there is two separate claims here regarding Ms. Richardson. So let's talk the PIP claim first. The only examination done for Ms. Richardson was the independent medical examination. It was prior to litigation and I believe prior to representation. Under the UIM portion of the claim prior to litigation, there has been no examination.

CP 279-283 (**Ex. L** at 99:11-25.)

The only time Counsel instructed the witness not to respond was when there was a valid legal objection and/or the time period was dealing with post litigation. In these instances, GEICO's counsel was properly instructing the 30(b)(6) deponent not to respond as the questions were invading the province of the post litigation privileges (*i.e.*, attorney client privilege and work product). GEICO's designee was permitted to respond to the extent he knew, so long as it was related to the time period prior to suit. The responses regarding post litigation would not be from GEICO in

the ordinary course of business, but rather in the context of defending itself in a lawsuit – legal strategy and decisions occurring in litigation.

H. GEICO Requests Fees

This Court should award GEICO reasonable attorneys' fees and costs because Respondent has attempted to re-litigate the instant issue, in an attempt to circumvent the Trial Court's prior order.

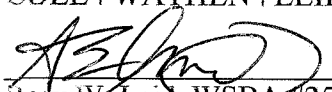
In GEICO's Opening Brief, GEICO did not initially seek fees, as it believed the Court's Order was merely incorrect, and sought review to remedy the same. However Respondent's actions since the Court Granting Review, (i.e., 1- moving to compel the materials that are specifically up on appeal, 2- seeking to depose Defense Counsel, and 3- moving for contempt against GEICO are wholly inappropriate, and further evidence of why the Court needs to reverse the Trial Court's order. GEICO timely and appropriately filed the instant appeal. Upon receiving an award from this Court, GEICO will submit an affidavit pursuant to RAP 18.1(d).

II. CONCLUSION

The Trial Court's Order should be reversed. The Court of Appeals should grant GEICO's motion for protective order to preclude the discovery of post litigation information and materials.

DATED this 6th day of February, 2017.

Respectfully Submitted,
COLE | WATHEN | LEID | HALL, P.C.



Rory W. Leid, WSBA #25075
A. Elyse O'Neill, WSBA #46563
Attorneys for GEICO

No. 48805-1-II

COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION II

CHRISTINE RICHARDSON,

Respondent,

vs.

GOVERNMENT EMPLOYEES INSURANCE COMPANY,

Petitioner.

PROOF OF SERVICE OF APPELLANT'S REPLY BRIEF

COLE | WATHEN | LEID | HALL, PC
Rory W. Leid, WSBA #25075
A. Elyse O'Neill, WSBA #46563
Attorneys for Petitioner
Government Employees Insurance Company
303 Battery Street
Seattle, WA 98121
Telephone: (206) 622.0494

I, Elyse O'Neill, the undersigned, hereby certify and declare under penalty of perjury under the laws of the State of Washington that the following statements are true and correct.

1. I am over the age of eighteen (18) years and not a party to the above-referenced action.

2. I hereby certify that I caused to be filed on February 6, 2017. Appellant's Reply Brief a copy of the aforementioned document was also served on:

Plaintiff's Counsel:	[X] *Via transmittal by the Washington State COA)*
Dalynne Singleton	**dalynne@glgmail.com**
Gourley Law Group	**tracy@glgmail.com**
Snohomish Escrow	[ ] Via Fax (360) 443-1259
The Exchange Connection	[ ] Via ABC Legal Messenger
1002 10th Street / PO Box 1091	[ ] US Mail
Snohomish, WA 98291	

Jean Jorgensen	[X] *Via transmittal by the Washington State COA)*
Law Office of Jean Jorgensen	jean@jeanlaw.com
1400 Talbot Road South, Ste 210	jamie.brazier@jeanlaw.com
Renton, WA 98055	[ ] Via Fax (360) 443-1259
	[ ] Via ABC Legal Messenger
	[ ] US Mail

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED this 6th day of February, 2017, at Seattle, Washington.

A. Elyse O'Neill
eoneill@cwlhlaw.com

COLE WATHEN LEID HALL

February 06, 2017 - 11:32 AM

Transmittal Letter

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Court of Appeals Case Number: 48805-1

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jean@jeanlaw.com
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jsherred@cwlhlaw.com